No. 93-229

In The
Supreme Court Of The United States
OCTOBER TERM, 1993

LARRY EDWARD DIXON

and

ESTATE of SALLY DIXON, by her personal representative, Johnathon Branch Dixon,

Petitioners,

v.

CSX TRANSPORTATION, INC.
A Virginia Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. CAN A RAILROAD AVOID COVERAGE UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT BY JOINING WITH OTHER RAILROADS IN AN UNINCORPORATED ASSOCIATION FOR THE PURPOSE OF JOINTLY EMPLOYING PERSONS TO DO WORK EXCLUSIVELY FOR THE MEMBER RAILROADS, PARTICULARLY WHEN THE RAILROAD HOLDS A DOMINANT POSITION IN THE MANAGEMENT OF THE ASSOCIATION?

II. WHETHER IT IS PROPER FOR AN APPELLATE COURT TO USE TRIAL TESTIMONY NOT AVAILABLE TO THE DISTRICT COURT AT THE TIME OF ITS DECISION TO CONCLUDE THAT THE DISTRICT COURT ABUSED ITS DISCRETION BY ORDERING A SINGLE TRIAL FOR DAMAGES UNDER THE MUTUALLY EXCLUSIVE REMEDIES OF THE FEDERAL EMPLOYER'S LIABILITY ACT AND COMMON LAW NEGLIGENCE?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iv

Citation to Opinion Below 2

Jurisdiction 3

Statutory Provision Involved 3

Statement of the Case 4

Reasons for Allowing the Writ . . 22

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER AN IMPORTANT ISSUE OF FEDERAL LAW, WHETHER A RAILROAD CAN AVOID FELA COVERAGE BY JOINING WITH OTHER RAILROADS IN AN UNINCORPORATED ASSOCIATION TO JOINTLY EMPLOY RAILROAD WORKERS. THE FOURTH CIRCUIT ANALYSIS OF THIS ISSUE IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, OF OTHER COURTS OF APPEAL AND STATE COURTS OF LAST RESORT . . 22

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE FOURTH CIRCUIT THAT IT IS AN ABUSE OF DISCRETION NOT TO BIFURCATE THE TRIAL OF A SUIT FOR DAMAGES

UNDER THE MUTUALLY EXCLUSIVE CLAIMS OF FELA AND COMMON LAW NEGLIGENCE 42

Conclusion 65

APPENDIX:

Opinion of the Fourth Circuit . . . . . App. A: 1

Opinion of the District Court Denying Defendant's Motions for Judgment Notwithstanding the Verdict and for a New Trial . . . . . App. B: 1

Order Denying Rehearing App. C: 1

TABLE OF CASES AND AUTHORITIES

CASES: Page

Anderson v. Well-Built Homes of Central Jersey, Inc., 69 N.J. Super. 246, 174 A.2d 216 (1961) . . . 34

Atlantic & Gulf Stevedores v. Ellerman Lines, Ltd., 369 U.S. 355, 360 (1962) 27

Baker v. Texas & Pacific R.R., 359 U.S. 227, 228 (1959) 28

Berger v. Mead, 127 Mich. App. 207, 338 N.W. 2d 919 (1983) 34

Bradsher v. Missouri Pacific R.R., 679 F.2d 1253 (8th Cir. 1982) 31

Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 783 (5th Cir. 1983) 52

Dixon v. CSX Transportation, Inc., 990 F.2d 1440 (4th Cir. 1993) 2

Dugas v. Kansas City Southern Railroad Lines, 473 F.2d 821 (5th Cir.), cert. denied, 414 U.S. 823 (1973) 50

Durham v. Southern Ry. Co., 254 F. Supp. 813, 814-16 (W.D. Va. 1966) . . 47

Fast v. Kahn, 206 Kan. 682, 481 P.2d 957 (1971) 24

Fitzgerald v. United States Lines, Inc., 374 U.S. 16 (1963) 59

Gallick v. Baltimore & Ohio R.R., 372 U.S. 108 (1963) 27

Gonzalez-Marin v. Equitable Life Assurance Society, 845 F.2d 1140, 1145 (1st Cir. 1988) 57

Hartford Accident & Indemnity v. Travelers, 525 S.W.2d 612 (Mo. App. 1975) 34

Hatter v. Lenox, 206 Pa. Super. 263, 212 A.2d 916 (1965) 38

Hebert v. Southern Pacific Transportation Co., 429 U.S. 904 (1976) 31

Hunt v. Regent Development Corp., 3 N.Y.2d 133, 164 N.Y. Supp.2d 694, 143 N.E.2d 892 (1957) 38

Hutchins v. Grace Tabernacle United Pentecostal Church, 804 S.W. 2d 598 (Tex Civ. App. 1991) . . 24

Ikerd v. Lapworth, 435 F.2d 197 (7th Cir. 1970) 47

Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) . 23,27,28,29,31,39

Lindsey v. Louisville & Nashville R.R. Co., 775 F. 2d 1322, 1324 (5th Cir. 1985) 24

Miles v. Apex Marine Corp., 494 U.S. 1003 (1990) 62

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) . . . 62

Opper v. United States. 348 U.S. 84, 95 (1954) 53

Pandolfo v. Bank of Benson, 273 F. 48 (9th Cir. 1921) 24

Pelliccioni v. Schuyler Packing Co., 140 N.J. Super. 190, 356 A.2d 4 (1976) 30

Pisicchio v. Salem Transportation Co., 159 A.2d 701, 553 N.Y. Supp. 2d 54 (App. Div. 1990) 37

Reed v. Pennsylvania, 351 U.S. 502 (1956) 27

Robinson v. Baltimore & Ohio R.R., 237 U.S. 84 (1915) 27

Rossanno v. Blue Plate Foods, Inc., 314 F.2d 174, 176 (5th Cir. 1963) 44

Scott v. Public Service Interstate Transportation Co., 6 N.J. Super. 226, 70 A.2d 882 (1950) 35

Seaboard Coast Line R.R. v. Gillis, 294 Ala. 726, 321 So.2d 202 (1975) 32

Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2nd Cir. 1990) 49

Southern Pac. Co. v. Jensen, 244 U.S. 205, 216-18 (1917) 62

Stich v. United States, 730 F.2d 115, 117 (3rd Cir. 1984) 44

United States v. Calabrese, 645 F.2d 1379, 1385 (10th Cir. 1981), cert. denied, 451 U.S. 1018 . . . 44,55

United States v. Socony-Vacuum Oil, Co., 310 U.S. 150, 239 (1940) 56

Vanskike v. ACF Industries, Inc., 665 F.2d 188, 199 (8th Cir. 1981), cert. denied, 455 U.S. 1000 (1982) . 31

Walling v. Western WIB, 160 F.2d 47 (7th Cir. 1946) 25

Ward v. Atlantic Coast Line R.R., 362 U.S. 396, 400 (1960) . . . 28

Wildman v. Lerner Stores Corp., 771 F.2d 605, 609 (1st Cir. 1985) 47, 63

STATUTES AND RULES:

Federal Rules of Civil Procedure:
Rule 8 59
Rule 42 59
Rule 42(b) 7,43,57

28 U.S.C. § 1257(1) 3
28 U.S.C. §§ 1331, 1332 (1988) . 6
45 U.S.C. § 51 3
45 U.S.C. § 56 (1988) 6

OTHER AUTHORITIES

Federal Practice and Procedure,
C. Wright & A. Miller, Vol. 9
(1971 & 1991 Supp.) 58

Moore's Federal Practice, Vol 5,
§ 42.02-.03 (1993) 58

Restatement (Second) of Agency
§ 220 28

Restatement (Second) of Agency
§ 220(2) 29

West's Federal Digests 2nd, 3rd,
and 4th 58

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Larry Dixon and Estate of Sally Dixon, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit

issued in this case on April 13, 1993. The Fourth Circuit denied Petitioners' timely filed Petition for Rehearing and Suggestion for Rehearing In Banc on May 10, 1993. A copy of that order appears in the Appendix to this petition, App. C:1.

CITATION TO OPINION BELOW

The opinion of the Fourth Circuit is reported as Dixon v. CSX Transportation, Inc., 990 F.2d 1440 (4th Cir. 1993). A copy of the opinion appears in the Appendix to this Petition, App. A:1. The memorandum of decision of the District Court denying the Defendant's motions for judgment notwithstanding the verdict and for a new trial is unpublished. A copy of the memorandum of decision appears in the Appendix to this Petition, App. B:1.

JURISDICTION

The opinion of the Fourth Circuit was issued on April 13, 1993. A Petition for Rehearing and Suggestion for Rehearing In Banc was denied on May 10, 1993. This Petition is filed within ninety (90) days of the date of that denial. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(1).

STATUTORY PROVISIONS INVOLVED

At issue in this case is 45 U.S.C. § 51 which provides in pertinent part:

> Every common carrier by railroad while engaged in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the . . . employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars,

> engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

I. Overview of the Trial and Appeal.

Larry Dixon, 47 years old, worked 20 years as a traveling agent for Southern Weighing and Inspection Bureau [SWIB]. On the morning of November 8, 1985, after doing paper work for SWIB at his home in Charlotte, North Carolina, he left in his 1972 Buick on his way to a work assignment in Blacksburg, South Carolina.

Ten miles from home, while crossing tracks with severe obstructions to vision of any oncoming train, his vehicle was hit by a 40 mph CSX train that had failed to sound its whistle until almost reaching the intersection. As a result of the accident, Dixon was left a spastic quadriplegic, with brain damage causing constant seizures, but fully conscious and able to completely understand and appreciate his condition.

SWIB was a nonprofit, unincorporated association formed by railroads (including a number of CSX's corporate predecessors) participating in the Southern Freight Association [SFA] to perform weighing and inspection services exclusively for the member railroads. If Dixon was an employee of CSX at the time of the collision, the Federal Employer's

Liability Act [FELA] provided the sole and exclusive remedy for his claim that CSX's negligence caused his injuries. If he was not an employee of CSX at the time of his injury, a North Carolina common law negligence claim provided his remedy. Uncertain as to the how the employment issue would be resolved, Dixon's suit against CSX asserted a FELA claim and a state law claim as alternative remedies. His wife, Sally Dixon, joined in the state law claim seeking damages for her loss of consortium.[1]

After the case had twice been calendared for trial and past the motion deadline in the District Court's scheduling order, (App. B:179) CSX filed

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[1] The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1332 (1988) and 45 U.S.C. § 56 (1988).

a motion under Rule 42(b), Fed. R. Civ. P., to "bifurcate" the trial by trying first the issue of whether Dixon was an employee of CSX within the meaning of FELA and then, depending on the jury's determination of that issue, to try the issues of liability and damages either under FELA or under the state common law. Since most of the evidence at trial would relate to the issues common to both claims of whether the accident was caused by CSX's negligence and/or by Dixon's contributory negligence and of damages, that the minor differences between the two claims could be managed through limiting instructions on any evidence that applied exclusively to one claim and an adequate charge to the jury, the District Court denied the motion. The District Court was concerned that

bifurcating the trial raised serious risks of multiple trials which would waste judicial resources and create a danger of inconsistent verdicts on the common issues of fact (particularly if a jury finding that Dixon was CSX's employee was overturned on appeal). (App. B:67-81).

At the two week trial, almost all of the witnesses gave testimony relating to the issues of negligence, contributory negligence and Dixon's damages which were common to both the FELA claim and the state law claim. In response to CSX's concerns about the differences between the FELA claim and the state law claim, the District Court bifurcated the closing arguments and charge to the jury. After closing arguments by counsel for Larry Dixon and CSX only, the District Court

instructed the jury on the FELA claim alone. The jury returned a special verdict finding that (1) Dixon was an employee of CSX at the time of his injuries; (2) that his injuries were proximately caused by the negligence of CSX (by failing to timely blow the train whistle, by failing to clear known visual obstructions from its right-of-way and by failing to install active warning devices at an extrahazardous crossing); (3) that Dixon was not contributorily negligent; and (4) that the damages necessary to fairly compensate him for his injuries were $13,609,308, composed of $8,609,308 for his "financial needs" (i.e., past and future lost wages and medical expenses) and $5,000,000 for his "mental and physical injuries." Then, following a second set of closing arguments in which

counsel for Sally Dixon participated as well, the District Court instructed the jury on the state law claim alone. The jury returned a special verdict finding that CSX was negligent on the same three grounds, that Dixon was not contributorily negligent, that his damages were $13,609,308, and that Sally Dixon's damages for loss of consortium were $1,500,000.

After denying CSX's post-verdict motions in an extensive written opinion (App. B:1-191), the District Court entered judgment for Larry Dixon on the FELA claim for the damages set by the jury. In anticipation that CSX would continue to maintain on appeal that Dixon was not its employee, the judgment of the District Court provided that, if recovery under FELA was not sustained on appeal,

the Dixons would recover on the common law claim for the damages set by the jury (a position adopted by Judge Wilkinson in his dissent, App. A:79-81).

The very contingency causing the District Court concern came to pass in the appeal. A majority of the three member panel of the Fourth Circuit held that, as a matter of law, Dixon was not an employee of CSX at the time of the accident. (App. A:34). Despite its conclusion that ample evidence supported the jury's findings establishing liability on the state law claim (i.e. that the accident was caused by CSX's negligence and Dixon was not contributorily negligent) (App. A:52-59), the panel majority went on to hold that a new trial <u>in toto</u> on this claim was required because the trial court had

"abused its discretion in refusing to bifurcate the trial." (App. A:21). Judge Wilkinson dissented. Noting the care taken by the trial court to distinguish the FELA and common law claims by bifurcating the closing arguments and jury charge, Judge Wilkinson was of the view that the panel majority had "lost faith in the capacity of juries to resolve civil disputes." (App. A:74,75).

II. Nature of SWIB and CSX's Position in SWIB.

SWIB's daily activities were under the supervision and control of its General Manager (Ernest Royals from 1982 until SWIB was disbanded in 1986). The Manager was under the direct supervision of the Chairman of SWIB's Executive Committee. At the time of the accident,

the position of Chairman was filled by John Paylor, CSX's vice-president and chief traffic officer.

SWIB employees did work only for member railroads. It did not offer its services to the public. SWIB was non-profit. Its expenses were paid from a fund maintained by the association's accounting arm, Southeastern Associated Railroad Bureau [SARB], which billed each railroad for a share of SWIB's costs monthly. Various methods were used the allocate the costs of SWIB's departments. For traveling agents, the time spent for a particular job was allocated to a particular railroad. The hours for all of the traveling agents were totalled, and each railroad was billed on the basis of its percentage of the total hours for all of the traveling agents. Travel

expenses incurred for a job were not allocated to the particular railroad for whom the job was being done. Instead, each railroad was billed for a share of the total travel expenses based on the percentage of total hours allocated to that railroad. For the month in which the accident occurred, CSX was billed for 56.15% of the salaries and expenses of the traveling agents, including those of Larry Dixon. SWIB did not issue paychecks for its employees. They were written by SARB from a SARB account.

Ordinarily, SWIB employees received specific job assignments from SWIB supervisors. Occasionally, SWIB traveling agents received job assignments directly from a member railroad. The railroad employees who comprised the Board adopted rules for the benefit of

each individual member railroads. For example, when at one railroad site, traveling agents were required to maintain confidences about the business of the other member railroads (i.e. when working on the property of Southern Railroad, Dixon could not disclose the business of CSX). In addition to economies of scale from jointly hiring workers through SWIB, a major function of SWIB was to employ uniform practices so that a railroad could trust the weights and measurements taken at another railroad.

On the day of the accident, Dixon started for Blacksburg at the direction of a SWIB manager to install a transit agreement requested by International Paper Co. International had shipped pulpwood from Mississippi to Cherokee

Consolidated warehouse in Blacksburg, South Carolina, for storage and was planning to later ship it to Pennsylvania or Ohio. A transit agreement would allow the shipper the lower rate applying to a shipment direct from Mississippi to Pennsylvania rather than the higher rate for the total of the two shipments. If he had arrived at Blacksburg, Dixon would have installed the transit agreement under Southern RR tariffs, because Southern was the initial carrier to Blacksburg. The rate set by the transit agreement would have applied to CSX and any other railroad that participated in the second leg of the shipment.[2]

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[2] CSX had no track to Blacksburg. CSX did have track in North Carolina and, as a matter of geography, the International Paper pulpwood would have to cross its territory to reach Pennsylvania.

Dixon's time for the day of the accident was allocated to Southern as part SARB's accounting system. Under the allocation system used by SARB, 56.15% of Dixon's travel expenses for the day of the accident were allocated to CSX.

SWIB's Articles of Organization effective August 1, 1968 (17 years prior to the accident), provided for three committees, General, Executive and Administrative, in addition to the Chairman and General Manager. Each member of a committee had one vote. The General Committee was to be composed of one officer from each member railroad, with railroads operating together as a single system under one management considered as a single member. It had the power to review any action of the Executive Committee upon the request.

The Executive Committee was to be composed of the chief traffic officer of ten member railroads. The Executive Committee elected the Chairman by unanimous vote, appointed and fixed the salary of the Manager by unanimous vote, and, by majority vote, acted for SWIB in all matters affecting its common interest, specifically including approving the Manager's appointment of Assistant Managers, fixing the salary of the Assistant Managers and approving any changes made by the Manager which had the effect of increasing SWIB expenses. The Executive Committee was to appoint three of its member to make up the Administrative Committee to handle "administrative and ministerial matters," which included approving the Manager's appointment of subordinate employees such

as Larry Dixon.

Sixty-eight railroads were listed in the 1968 Articles as members of the association. By 1984, as the result of mergers and deregulation in the industry, SWIB's membership had declined dramatically, leading to an alteration of the management structure envisioned in the 1968 Articles. The distinction between the committees was lost. The ten member Executive Committee and three member Administrative Committee collapsed into a single two-man committee made up of CSX's chief traffic officer and his counterpart from Southern Railway. CSX's chief traffic officer also assumed the position of SWIB's Chairman.

During the year preceding the accident, this two-man committee made the broad policy decisions for SWIB,

including approval of the budget and determining the benefits that would be extended to SWIB employees. Much of the discussion in this period related to the termination of SWIB. It was disbanded completely in 1986. After SWIB was terminated, the weighing and inspection functions it had performed were taken over by employees of the individual railroads. Many SWIB employees were hired by an individual railroad. Those who were hired after SWIB was terminated transferred to the railroad's payroll with the accumulated seniority earned during employment by SWIB.

III. Rationale of Fourth Circuit Decision that a Directed Verdict on the Issue of Employment Was Appropriate.

The Fourth Circuit decision allows CSX to avoid liability under the Federal

Employers' Liability Act by finding as a matter of law, a jury could not reasonably find Dixon was an employee of CSX because he was only subject to the direct supervision of SWIB managers, his travel time was allocated to Southern Railroad under the SARB accounting system (although his mileage was not), there was no evidence that CSX could have benefitted from the job assignment, and CSX's dominate position on the SWIB managing boards was subject to the theoretical control of a larger board of railroads.

IV. Rationale of Fourth Circuit Decision that Bifurcation Was Mandatory.

The Fourth Circuit ruled that the district court abused its discretion in denying CSX's pretrial motion to bifurcate the trial. To reach this

conclusion, the Fourth Circuit opinion examined the trial transcript for events that occurred and might not have if the motion had been granted. The opinion concluded that the pretrial ruling was an abuse of discretion (1) because the jury heard at trial Sally Dixon's "loss of consortium" evidence, which the opinion concluded was relevant to the common law claim but not the FELA claim, (2) the jury heard at trial evidence about Larry Dixon's employment, which the opinion concluded was relevant to the FELA claim, but not the common law claim, and (3) the fact that the jury awarded the same damages on both claims was evidence of considerable jury confusion.

REASONS FOR ALLOWING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER AN IMPORTANT ISSUE OF FEDERAL LAW, WHETHER A RAILROAD CAN

AVOID FELA COVERAGE BY JOINING WITH OTHER RAILROADS IN AN UNINCORPORATED ASSOCIATION TO JOINTLY EMPLOY RAILROAD WORKERS. THE FOURTH CIRCUIT ANALYSIS OF THIS ISSUE IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, OF OTHER COURTS OF APPEAL AND STATE COURTS OF LAST RESORT.

A grant of certiorari is warranted to review the opinion of the Fourth Circuit in that it is in conflict with the general body of case law in worker's compensation cases holding that a person employed by an association of businesses or other entities is jointly employed by each of the members, even though control is shared, and is employed by a member of the group even when on an job assignment for another member of the employer group and with the principles enunciated by this Court in Kelley v. Southern Pacific Co., 419 U.S. 318 (1974). The Fourth Circuit held the body of case law dealing

with worker's compensation cases rested on state statutes which had no application to the FELA employment issue (App. A:27, n. 8),[3] in direct conflict with the Fifth Circuit opinion holding that the worker's compensation cases are the source of the common law for the FELA employment issue. Lindsey v. Louisville

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[3] None of the cases making up this body of law refer to a statutory definition of "employed by" or "employee" as a basis for their result. The Fourth Circuit opinion also holds that membership in an unincorporated association does not subject the member to liability for the unlawful acts of the association's employees. This holding is in conflict with the ruling of another court of appeals and state courts of last resort that persons who associate together for some business purpose are each liable for injuries resulting from the wrongful acts of the employees of the association just as if they had entered into a partnership agreement. Pandolfo v. Bank of Benson, 273 F. 48 (9th Cir. 1921); Fast v. Kahn, 206 Kan. 682, 481 P.2d 957 (1971); Hutchins v. Grace Tabernacle United Pentecostal Church, 804 S.W.2d 598 (Tex Civ. App. 1991).

& Nashville, R.R., 775 F.2d 1322, 1324 (5th Cir. 1985) ("The test of employment [for purposes of FELA] is the established test in workers' compensation cases.")

This court has not addressed the question of whether a person employed by an unincorporated association of railroads can be treated as a joint employee of each member railroad for FELA coverage or whether this is a mechanism by which railroads can avoid FELA coverage.[4]

There are many kinds of work

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[4] A claim that inspection bureau employees are jointly employed by the railroads making up its membership is not novel. Inspection bureau employees have been held to be the joint employees of the railroads, and not the employee of the bureau, to exclude them from coverage of the Fair Labor Standards Act. See Walling v. Western Weighing & Inspection Bureau, 160 F.2d 47 (7th Cir. 1946).

necessary to the operation of an interstate railroad in interstate commerce common to all railroads. This ruling encourages railroads to transfer common kinds of jobs from individually employed workers to an association that employs the workers as a means of avoiding the cost of FELA coverage without giving up any significant amount of control over the work.

A. Failure to follow established case law regarding employment issue.

FELA was enacted in 1908 to provide compensation to railroad employees injured in their employment who, under common law, were barred from recovery by the defenses of assumption of the risk and fellow-servant. It applies to any person injured while working in the

employment of a railroad, Reed v. Pennsylvania, 351 U.S. 502 (1956), by the slightest degree of negligence of the railroad. Gallick v. Baltimore & Ohio R.R., 372 U.S. 108 (1963). The right to a jury determination of the ultimate questions of fact is an essential part of the remedy itself, protected by the Seventh Amendment. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 360 (1962).

FELA has no special definition of who is "employed" by a railroad and uses the term in the sense of the common law servant. Robinson v. Baltimore & Ohio R.R., 237 U.S. 84 (1915). Whether the master-servant relationship exists under FELA is a question that, "like that of fault or of causation under the Act, contains factual elements such as to make

it one for the jury under appropriate instructions as to the various relevant factors under law." Baker v. Texas & Pacific R.R., 359 U.S. 227, 228 (1959) (per curiam); Accord, e.g., Ward v. Atlantic Coast Line R.R., 362 U.S. 396, 400 (1960). The "various relevant factors" to be considered by the jury are those identified in Restatement (Second) of Agency §220 (1958) (hereinafter, Restatement), relevant to whether a person is "employed to perform services in the affairs of another . . . subject to the other's control or right of control." Kelley v. Southern Pacific Co., 419 U.S. 318, 324 (1974).

In Kelley, this Court recognized three methods by which a worker, nominally employed by another, could establish he was an employee of a

railroad for FELA: (1) as a borrowed servant of the railroad; (2) as a servant acting for more than one master; or (3) as a subservant of an employer which was in turn a servant of the railroad. 419 U.S. at 324; Restatement (Second) Agency § 220(2) (1958).

The basis of Dixon's claim of employment by CSX rests in either of two categories established by Kelley, that is, he was either a "subservant of a servant" (Dixon was a servant of SWIB who was a servant of CSX) or he was a "servant acting for [multiple] masters (Dixon was a servant acting for all of the railroads). The Fourth Circuit treated SWIB as an independent employer. There is no question that Dixon was a servant of SWIB and, therefore, a subservant of SWIB's master. The issues,

therefore, are whether Dixon was a servant acting for multiple masters, one of which was CSX, or was Dixon a subservant of a company that itself was a servant of CSX.

FELA cases applying the subagent method to wholly owned subsidiary of the railroad make it clear that the subagent method does not require evidence of direct supervision of the worker by a railroad manager at the time of the injury and, instead, is based on the right of the railroad to control the activities of its agent, the subsidiary employing the plaintiff. See, e.g., Pelliccioni v. Schuyler Packing Co., 140 N.J. Super. 190, 356 A.2d 4 (1976) (on remand from Supreme Court for reconsideration in light of Kelley) (employee of railroad although paid and

supervised only by the subsidiary, never supervised by railroad employee and was member of teamsters and not railroad union); Bradsher v. Missouri Pacific R.R., 679 F.2d 1253 (8th Cir. 1982); Vanskike v. ACF Industries, Inc., 665 F.2d 188, 199 (8th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).[5]

FLEA cases arising in the context of

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[5] In Kelley, after finding the borrowed servant method did not apply because railroad employees played no supervisory role in the plaintiff's activities at the time of the injury, the Court remanded the case to the trial court, because there was enough evidence to raise an issue of fact on the subservant theory, even though there was no overlap of supervisory personnel and the subsidiary did some work for other businesses. On remand, the trial judge, sitting without a jury, found that subsidiary was a servant of the railroad and the plaintiff a subservant of the railroad. See Herbert v. Southern Pacific Transportation Co., 429 U.S. 904 (1976) (Blackman, J. dissenting from denial of cert.)

a entity operated jointly by more than one railroad are not numerous.[6] An association of independent entities for the purpose of jointly employing servants is, however, a common form of enterprise, and the issue of the employment status at the time of injury has arisen frequently in worker's compensation cases. These cases hold that a person injured while employed in the service of such an association is employed by each member of the enterprise at the time of the injury.

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[6] In Seaboard Coast Line R.R. v. Gillis, 321 So.2d 202 (Ala. 1975), where the plaintiff was injured while employed and supervised solely by Clinchfield Railroad, a partnership form by Seaboard and L&N RR., the court held that he had a FELA claim against all three railroads because "there is not merely a close relationship between L&N and Seaboard on the one hand and Clinchfield on the other, there is identity. For the purpose of joint and several liability, L&N and Seaboard are Clinchfield." 321 So.2d at 206.

Worker's compensation cases skip over the non-corporate employing association, going directly to the issue of whether a person is a joint employee of all of the members of the association. The issue arises in two contexts: (1) when a person employed in the business of the joint enterprise is injured by the negligence of one member and sues, raising the question of whether suit is barred by the exclusive, limited remedy of worker's compensation; and (2) when the member most directly involved pays the worker's compensation claim and seeks contribution from the another member. The cases hold, universally in the first context and generally in the second, that a person engaged in the service of the joint enterprise is jointly employed by all of the members of the enterprise at

the time of the injury. See, e.g., Berger v. Mead, 127 Mich. App. 207, 338 N.W.2d 919 (1983) (police officer on payroll of one city can't sue officers from another city who shot him during training exercises of a tactical squad made up of officers from a number of cities, because he is the joint employee of all of the police departments while engaged in the activities of the squad).[7]

Workers' compensation cases also deal with the situation in which, at the

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[7] See also, Hartford Accident & Indemnity v. Travelers, 525 S.W.2d 612 (Mo. App. 1975) (company paying worker's compensation to salesman employed by two companies entitled to contribution from the other); Anderson v. Well-Built Homes, Inc., 69 N.J. Super. 246, 174 A.2d 216 (1961) (secretary for three separate businesses who slips while answering telephone is employee of all three businesses)

time of injury, an employee was doing work for one member of the employing association. Such a person is employed at the time of injury by all of the business in the association including a business for whom work was not being done and whose negligence caused the injury. Directly comparable to this case is Scott v. Public Service Interstate Transportation Co., 6 N.J. Super. 226, 70 A.2d 882 (1950).

Scott was employed by two bus companies, Interstate and Coordinated, to do general cleaning work and clean the buses of each company at a garage used by both. The garage was supervised by a superintendent, employed by both companies with his salary split equally. Scott's salary was not split equally. At end of each day, his time was allocated

between the companies based on the number of hours he worked for each. His paycheck was written from a joint account and his wages allocated to the companies based on the time he worked specifically for each. While he was cleaning a Coordinated bus, a bus owned and operated by Interstate, backed into Scott and killed him. His widow sued Interstate for its negligence. The suit was dismissed under the worker's compensation statute, because Scott was employed by Interstate even when he was doing work specifically for Coordinated. The Court held that Scott was <u>at all times</u> under the control of both companies, because their right to control was exercised through the supervision of the jointly employed supervisor. The Court rejected the claim that Scott was not an employee

of Interstate while doing work allocated to and paid for by Coordinated. The fact that his time "may have been charged to one company or the other did not alter the employer-employee relationship of the control by both companies." 70 A.2d at 884.

The result is Scott was dictated by a well established general rule, a person employed by an association of entities remains jointly employed by all members of the enterprise even when doing work that can be ascribed to only one member. In Pisicchio v. Salem Transportation Co., 159 A.2d 701, 553 N.Y. Supp. 2d 54 (App. Div. 1990), a driver for Salem and another trucking company injured while leaving the terminal to drive for the other company was held to be the employee of Salem leaving him with his worker's

comp claim and unable to sue Salem for negligence. In Hatter v. Lenox, 206 Pa. Super. 263, 212 A.2d 916 (1965), a receptionist employed by two doctors with independent practices was injured while at the office before normal hours at the specific request of one doctor. The court held she was the employee of both doctors even when her work at the moment of injury was for only one of them:

> There was very little these two doctors had in common so far as their practice was concerned. Undoubtedly claimant's employment required a sharp separation of duties, each attributable and definable to one particular employer. Whether that duty required arrival before working hours or on a special errand during working hours, it was the claimant's duty to serve them both in the nature of her employment.

212 A.2d at 918. See also Hunt v. Regent Development Corp., 3 N.Y.2d 133, 164 N.Y.

Supp.2d 694, 143 N.E.2d 892 (1957) (watchman employed by two companies a block apart injured on property of one employed by both at the time of the injury).

The jury in this case was instructed on all of the factors described in Restatement as required by Kelley, supra, and asked to decide whether Larry Dixon was employed by CSX at the time of his injury. CSX made no complaint about the adequacy of the instructions. The evidence established a combination of factors, including: Dixon's supervision by SWIB managers running up a chain of command to GM Royals who was under the control or the right to control by the SWIB Chairman, CSX vice-president Paylor, and the SWIB Executive and Administrative Committees, composed of CSX vice-

president Paylor and his counterpart from Southern Railway; CSX's continued membership in the unincorporated association which paid all of SWIB's costs and was the exclusive user of SWIB's services; SWIB's and Dixon's functions devoted solely to work necessary for CSX and the other members to operate under their tariffs; the allocation of 56.15% of all of SWIB's expenses to CSX for the month of the injury; Dixon's injury occurring 10 miles from his home while at the beginning of a trip to Blacksburg to install a transit agreement that would have been applicable to CSX; the allocation of all of Dixon's time on the day of the injury to Southern under SARB's accounting system, because time of a traveling agent was allocated to a particular railroad and, if he had

arrived in Blacksburg, the transit agreement would have been installed under Southern's tariffs; the allocation of 56.15% of Dixon's travel expenses for the day of the injury to CSX, because travel expenses are not allocated directly to the railroad to whom the time is allocated; and the rule requiring SWIB employees not to discussion with one railroad the secrets of another, which would have protected CSX when Dixon was on the property of another railroad like Southern.

For this set of circumstances, the common law definition of master-servant compels a conclusion that Dixon was employed by CSX at the time of his injury. A reasonable jury certainly could, as this one did, find that CSX had a right to control Dixon's and did so

through the SWIB management that CSX had a right to and did control through its vice-president Paylor.

To direct a verdict on this evidence establishes a mechanism for CSX and other railroads to create organizations such as SWIB that will allow total avoidance of any obligation under FELA. To allow this ruling to stand has profound ramifications for all workers currently protected by FELA and runs contrary to the very purposes of FELA.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE FOURTH CIRCUIT THAT IT IS AN ABUSE OF DISCRETION NOT TO BIFURCATE THE TRIAL OF A SUIT FOR DAMAGES UNDER THE MUTUALLY EXCLUSIVE CLAIMS OF FELA AND COMMON LAW NEGLIGENCE.

A grant of certiorari is warranted to review the Fourth Circuit's unprecedented ruling that the trial court abused its discretion in trying together

two jointly pleaded claims arising out of exactly the same accident, which occurred at exactly the same crossing, transpired in the exactly same instant, and involved exactly the same participants and witnesses. Review of the panel's ruling is called for because it clearly meets the governing standards for granting certiorari by this Court. In particular:

> (1) The opinion conflicts with the law of other circuits, by ordering a new liability trial based solely on a hindsight-based second-guessing of the district court's exercise of discretion; and
>
> (2) The panel opinion both overlooks controlling Supreme Court precedent and radically departs from consistent court practice in other circuits, by condemning a district court's joint trial of jointly pleaded claims based on a single occurrence.

A. <u>The misuse of selective hindsight</u>.

The denial of a Rule 42(b) motion is

reversible only for an "abuse of discretion." Since any abuse of discretion logically must occur when the trial judge actually exercises that discretion, see, e.g., Stich v. United States, 730 F.2d 115, 117 (3rd Cir. 1984), appellate inquiry into the soundness of a bifurcation ruling must focus on "[w]hen the ruling was made." Rossanno v. Blue Plate Foods, Inc., 314 F.2d 174, 176 (5th Cir. 1963). Indeed, even in a criminal case, an appellate court "cannot by hindsight find an error on this basis." United States v. Calabrese, 645 F.2d 1379,1385 (10th Cir. 1981), cert. denied, 451 U.S. 1018. The Fourth Circuit decision warrants rehearing because it contravenes these elementary and critical principles of judicial administration.

Consider the position of the District Judge at the time the defendant railroad made its pretrial "bifurcation" motion. In effect, that motion asked for two separate bifurcations. First, the FELA claim was to be disconnected from the common-law claim, so that the two would not be tried together. Then the employment issue raised by the FELA claim was to be bifurcated from the liability and damages issues presented by that same claim and tried first alone. See App. B:70-72. The District Judge recognized that granting the motion thus to trifurcate the action created a certainty of two separate trials that would necessitate repeat performances by a number of witnesses. (App. B:69, 70, 75, 76). More important, he recognized the very real risk of having to hold three

separate trials if the defendant's proposed approach were followed: first, a trial on railroad-employee status under FELA; next, a second full trial on FELA liability and damages if there were a finding of such employment; and finally, if the Court of Appeals later reversed the sure-to-be-hotly-contested finding of FELA employment, a third trial on common-law liability and damages all but exactly duplicative of the second. (App B:70-72). Faced with the prospect of such a burdensome and protracted set of proceedings, The District Judge simply ordered the sort of trial routinely conducted by federal district courts: namely, a joint trial of companion federal-law and state-law claims that

arose out of a single set of facts.[8]

In assessing the appropriateness of

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[8] See, e.g., Ikerd v. Lapworth, 435 F.2d 197 (7th Cir. 1970) ("considerations of judicial economy strongly favor simultaneous resolution of all claims growing out of one event"); Durham v. Southern Ry. Co., 254 F. Supp. 813, 814-16 (W.D. Va. 1966) (refusing to bifurcate FELA claim against two defendants from a North Carolina Wrongful Death Act claim against third defendant, when all claims arise from same accident, despite argument that the "bases of recovery under FELA and the North Carolina Wrongful Death Act are entirely different"; court reasons that there is "little difference between the three causes of action, and "by proper instructions the jury will be able to understand the different considerations" under the different statutes); Wildman v. Lerner Stores Corp., 771 F.2d 605, 609 (1st Cir. 1985) (no abuse of discretion where ADEA and Puerto Rico Anti-Discrimination Statute claims were tried together, "the liability issue was the same under all claims," the "district court carefully and correctly explained the burden of proof applicable to the statutes," separate written interrogatories were submitted for each of the statutes, and instructions to the jury were sufficient for it to cope with and apply correctly the different burdens of proof).

the District Judge's exercise of discretion, it is telling -- and should be dispositive -- that the very contingencies he foresaw as likely to produce three costly trials now have come to pass: the jury in fact found FELA employment, and the Court of Appeals has reversed that finding as a matter of law. No less important, from the outset, an "almost complete overlap" of the evidence, as well as a plethora of additional factors, counseled rejection of the defendant's self-serving proposal of a multi-layered proceeding.[9] Faced

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[9]For example, separate trials risked conflicting approaches to the case by two juries. Any retrial would require an exact duplication of the extensive and expensive expert testimony, as well as a duplicative rehash of virtually all of the documentary evidence. As Mrs. Dixon's intervening death has confirmed, inviting a post-appeal second trial was particularly inadvisable in this case

with the eminent reasonableness of a joint trial in these circumstances, the Fourth Circuit Opinion did not seriously question the District Judge's actual weighing of the relevant factors at the time he ruled on the trifurcation motion. Instead the Opinion weaved together a post hoc condemnation of the District

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because a number of key witnesses were old or sick. Inviting such a retrial also presented a highly wasteful prospect because each separate trial predictably would occupy some two full weeks of court and juror time. The two claims, moreover, involved not only the same facts, but the same basic issues as well -- namely, negligence and contributory negligence. Finally, the District Judge in rejecting the bifurcation motion, could properly consider the defendant's failure to file that motion until after the court's third calendaring of the case for trial and more than a full year after the District Court's motions deadline, (App. B:68). See, e.g., Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2nd Cir. 1990) (relying, inter alia, on delay in making bifurcation motion in finding no abuse of discretion in denial).

Judge's ruling based on various alleged trial errors never even objected to by the defendant.

First, the Opinion reasoned that Mrs. Dixon's so-called "loss of consortium" testimony was "highly prejudicial" to the railroad because a spouse's claim for loss of consortium is not recognized under FELA. The Opinion was incorrect in asserting that this evidence was "irrelevant to Mr. Dixon's FELA claim," (App. A:13), because Mrs. Dixon's testimony as to the couple's "wonderful marriage," "affectionate" bond, and "wonderful sex relationship", (App. A:11, 12), was directly relevant to show Mr. Dixon's loss of enjoyment of life -- an item of damage clearly recoverable under FELA. See App. A:17, citing Dugas v. Kansas City Southern

Railway Lines, 473 F.2d 821 (5th Cir.), cert. denied, 414 U.S. 823 (1973). Even more important, after the Court found the FELA claim unsustainable, the only question it confronted was whether the supposedly erroneous "bifurcation" ruling required a new trial on the state law claim. As Judge Wilkinson cogently observed: "This argument [concerning the loss-of-consortium evidence] cannot support a new trial. Since North Carolina law permits recovery for loss of consortium, any prejudice from the loss of consortium evidence as to the Dixons' common-law claims would have been, by definition, proper." (App. A:72).

Next, the Opinion reasoned that "the joint trial of these distinct actions also resulted in considerable juror confusion, as evidenced by the damages

awards on the alternative verdicts." (App. A:16). The Opinion's reliance on supposed jury confusion about damages is not well-founded and conflicts with the rulings of this Court and of other circuits.[10] Even if it were, however,

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[10] For a detailed explanation why, see App. A:16-19. Most important, the Opinion overlooked the following finding made by the District Judge who -- unlike the panel -- actually saw the jury in action: "The court observed the jury..., and at no time observed any appearance of confusion, bewilderment or any other indication that they did not fully understand and appreciate the nature of the two separate causes of action pursued by plaintiffs. . . . It appears to the court from [the jury's specific inquiry regarding damages] that the jury were aware of the differences in calculation of damages under FELA and under common law negligence." (App. B:183). Particularly in light of this finding, the reliance on supposed "juror confusion" was directly contrary to governing law. See Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 783 (5th Cir. 1983) ("We cannot condemn the verdict as defective on its face because the awards were identical, even though the elements of damages sought by the

"the most this argument proves is the need to remand for retrial on damages alone. In no way does it justify the more drastic remedy of a whole new trial." App. A:81 (Wilkinson, J., dissenting).

It follows that the only possible ground for ordering a new liability trial based on the failure to trifurcate lies in the assertion that the evidence of Mr. Dixon's status as a railroad employee under FELA was "highly prejudicial" with

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respective plaintiffs differed"; and relying in particular on the fact that the "trial court was 'satisfied that there was no mistake as to the jury's intention'"). See generally Opper v. United States, 348 U.S. 84, 95 (1954) ("To say that the jury might have been confused [when severance was not granted] amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the Court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions.").

respect to the jury's ruling on the common-law claim. To state this assertion is to refute it. Indeed, it is hard to conceive of evidence more technical, arcane and innocuous than the evidence offered to show that Mr. Dixon was a CSX employee under the "subservant" and "multiple master" theories.

Given this fact, it is not surprising that the panel majority does not really rely at all on the existence of "prejudicial" evidence regarding Mr. Dixon's employment. Instead the panel majority reasons that Judge McMillan's abuse of discretion in failing to conduct multiple trials is revealed by plaintiff's counsel's brief reference in the FELA closing argument to CSX's being "a 'ruthless' employer more concerned with 'the bottom line' than with the

well-being of its employees." App. A:15. This remark could not have been anticipated by the district court and thus cannot be used to show abuse of discretion in earlier deciding not to trifurcate the trial. See United States v. Calabrese, 645 F.2d 1379, 1385 (10th Cir. 1981), cert. denied, 451 U.S. 1018 (1981) (rejecting "a rule requiring separate trials whenever the unexpected conduct of one attorney or defendant might prejudice another" because such a rule would "preclude the use of joint trials altogether"). In any event, as Judge Wilkinson observed in his dissent: "I have difficulty believing that some closing remarks, to which CSX did not object at trial, could seriously have

affected the jury's verdict." App. A:73.[11]

In short, the Fourth Circuit majority's hindsight-driven "bifurcation" ruling ignores controlling law. In particular, it cannot stand because the "rationale . . . that the joint trial caused 'considerable juror confusion'" rests on nothing more than "bald contention" and "conjecture." App. A:74.

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[11] Defense counsel never contemporaneously objected to the allegedly improper closing argument of plaintiffs' counsel, never requested a mistrial based on that argument, never relied on the closing argument in its motion for new trial, and never presented a closing-argument claim of error to the trial court at any time or in any way whatsoever. In these circumstances it cannot be said that denial of the separate trial motion caused any unfair prejudice to the defendant since any possible prejudice was brought on by the defense's own failure to seek protective or corrective action. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 239 (1940).

(Wilkinson, J., dissenting).

B. Universal Practice and Supreme Court Precedent.

It is important to recognize the genuinely extraordinary nature of what the Fourth Circuit majority has done in this case. It has declared that the district court "abused its discretion" in jointly trying two claims, properly pleaded together in the same complaint, that arose out of the very same occurrence. After extensive research, plaintiffs' counsel have concluded that never, in the 54 years since adoption of the Federal Rules of Civil Procedure, has any reported decision from any circuit court ever held that any district court abused its discretion in failing to bifurcate under F.R.C.P. Rule 42(b). Accord, Gonzalez-Marin v. Equitable Life

Assurance Society, 845 F.2d 1140, 1145 (1st Cir. 1988) ("Although Equitable urges us to find such an abuse [of discretion in the trial court's denial of a motion to bifurcate] in the instant case, it fails to cite a single case in which an appellate court has reversed a decision for failure to bifurcate and we also have been unable to find any." Emphasis added.).[12] Most important for present purposes, no such abuse has been found based on any failure to bifurcate two claims joined in a single complaint based on a single occurrence.

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[12]Counsel for plaintiffs in the case at bar believe the First Circuit's finding to be still valid, after thoroughly searching West's Federal Digests, 2nd, 3rd and 4th, C. Wright & A. Miller, Federal Practice and Procedure, Vol. 9, §§2381-92, (1971 & 1991 Supp.), and Moore's Federal Practice, Vol. 5, ¶s 42.02-.03 (1993).

The reasons for the appellate courts' universal practice are not complex. Rule 8 clearly envisions the joint prosecution of claims. See Fed. R. Civ. P. Rule 8. Rule 42 affords to district courts discretion that is "extensive." And common sense counsels that, if it ever makes sense to try claims together, it is when they arise from precisely the same event. The critical point is that the decision of the panel majority not only is unusual; it is unprecedented.

The Fourth Circuit Opinion also contravenes this Court's decision in Fitzgerald v. United States Lines, Inc., 374 U.S. 16 (1963). In Fitzgerald, an injured seaman's administrator had sought to join for trial before a single jury a claim of negligence under the Jones Act

and another claim under admiralty law for maintenance and cure. The district court had bifurcated the proceeding because the separate claims involved "slightly different principles and procedures," and because "damages are measured by different standards." Id. at 18. This Court ruled that the district court had erred as a matter of law in not conducting a single trial on both claims before the same jury. The Court reasoned that the incompatible damages standards favored the resolution of all damages issues by a single factfinder to negate the risk of conflicting approaches. More fundamentally, however, the Court mandated a joint trial because the two claims "are based on one unitary set of circumstances, serve the same purpose of indemnifying a seamen for damages caused

by injury, depend in large part upon the same evidence, and involve some identical elements of recovery." Id. at 18. This Court put its holding in blunt terms that directly control this case: "Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments." Id. at 21.

C. Future Dangers.

Finally, the Fourth Circuit Opinion warrants rehearing because it endangers the cause of just and sound judicial administration. At the least, the ruling will routinely result in multiple trials in cases, like this one, involving

mutually exclusive alternative claims.[13] More important, the principle applied by the panel majority to decide this case mandates multi-stage trials in innumerable additional cases heretofore routinely handled by way of the ordinary, single unitary proceeding. This is so because, as Judge Wilkinson observed, the

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[13]It bears emphasis, in this regard, that there are important bodies of federal law, in addition to FELA, that exclude resort to jointly pleaded state claims based upon some initial factual "status" determination like the railroad-employee determination necessitated by this case. See, e.g., Miles v. Apex Marine Corp., 494 U.S. 1003 (1990) ("The Jones Act preempts state law remedies for the death or injury of a seaman"); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) (holding that Death on the High Seas Act, if applicable, provides an exclusive remedy, thus displacing wrongful death remedies under state law); Southern Pac. Co. v. Jensen, 244 U.S. 205, 216-18 (1917) (holding that if plaintiff's work was "maritime in nature" general admiralty law provided remedy exclusive of state personal injury law).

risk of prejudice to the parties through the joint trial of two claims in a single-event train-crash case is infinitely less than the risk of prejudice when a jury, for example, confronts a multi-act, multi-issue, multi-claim antitrust or securities case. App. A:74. Accord, e.g., Wildman v. Lerner Stores Corp., 771 F.2d 605, 609 (1st Cir. 1985).

We live in a time of unprecedented concern about the overcrowding of court dockets, and eroding public confidence in the judiciary due to the delays, costs and complexities of even ordinary litigation. In this case, the District Judge responded to these concerns in a way that would be expected of any reasonable district court judge: by declining to split into three parts a

single action against a single defendant based on a single crossing accident that transpired in a single split-second. In his dissent Judge Wilkinson captured well why the trial court's ruling was sound and why the ruling of the panel majority is fraught with danger:

> Civil plaintiffs assert alternative theories of recovery all the time. Next to the issues posed in a large antitrust or commercial contract dispute, the issues in this case pale in their complexity and scope: How fast did Mr. Dixon approach the crossing? Did he stop first to look for an oncoming train? How clear was his view down the tracks? Did he have enough time to spot the oncoming train and get out of the way? These are just the sorts of determinations for which juries are best suited. In this case, moreover, the District Court took particular care to keep the FELA and state law standards distinct, by bifurcating the charges to the jury, and by allowing the litigants to make separate

> closing arguments about each claim. Unless we have lost faith in the capacity of juries to resolve civil disputes, the assertion that the joint trial somehow confused the jury must fail.

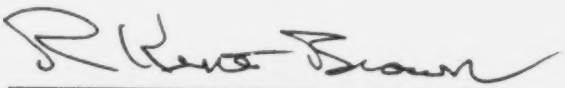
App. A:74,75 (emphasis added).

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that this Court grant their petition and issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

This the 5th day of August, 1993.

Respectfully submitted,



R. Kent Brown
ATTORNEY FOR PETITIONER

Filing and Mailing Certificate

I do hereby certify that I have this 9th day of August, 1993 filed 40 copies of the foregoing Petition for Writ of Certiorari with the Clerk's Office of the Supreme Court of the United States and have mailed the required three (3) copies to opposing counsel.

The necessary filing and mailing was performed in accordance with instructions by counsel on the case.

Barbara E. Grove

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